

ATTORNEYS AT LAW SINCE 1895

VIA FEDEX

227447



July 16, 2010

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: STB Docket No. AB-1043 (Sub-No. 1)
Montreal, Maine & Atlantic Railway, Ltd.
- Abandonment and Discontinuance of Service -
In Penobscot and Aroostook Counties, Maine
State of Maine, Department of Transportation
Offer of Financial Assistance

FILED
JUL 19 2010
SURFACE
TRANSPORTATION BOARD

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding are the original and 10 copies of the Offer of Financial Assistance being filed on behalf of the State of Maine, Department of Transportation.

Although the State believes that it is entitled to a waiver of the filing fee (see the enclosed letter filed with the Board on July 9, 2010), it is enclosing a check in the amount of \$1500 representing the filing fee that would otherwise be due. The State requests that the Board promptly determine whether the fee is waived, and either send back the check or promptly refund the amount paid.

Please time stamp the extra copy of this letter to indicate receipt and return it to me in the self addressed envelope provided for your convenience.

Please let me know if there are any questions regarding this filing.

Respectfully,

Eric M. Hocky

EMH/e

cc: All parties of record.

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Office of Proceedings

JUL 19 2010

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Enclosure

Enclosure

Enclosure

Enclosure

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB 1043 (Sub-No. 1)

227447



FILED
JUL 19 2010
SURFACE
TRANSPORTATION BOARD

MONTREAL, MAINE & ATLANTIC RY., LTD.

- DISCONTINUANCE OF SERVICE AND ABANDONMENT -
IN AROOSTOOK AND PENOBSCOT COUNTIES, MAINE

STATE OF MAINE, DEPARTMENT OF TRANSPORTATION
OFFER OF FINANCIAL ASSISTANCE (OFA) TO ACQUIRE RAIL LINES,
AND REQUEST FOR TOLLING OF OFA PROCESS

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SURFACE
TRANSPORTATION BOARD

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Dated: July 16, 2010

Attorneys for State of Maine, Department of
Transportation

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB 1043 (Sub-No. 1)

**MONTREAL, MAINE & ATLANTIC RY., LTD.
- DISCONTINUANCE OF SERVICE AND ABANDONMENT -
IN AROOSTOOK AND PENOBSCOT COUNTIES, MAINE**

**STATE OF MAINE, DEPARTMENT OF TRANSPORTATION
OFFER OF FINANCIAL ASSISTANCE (OFA) TO ACQUIRE RAIL LINES
AND REQUEST FOR TOLLING OF OFA PROCESS**

The State of Maine, by and through its Department of Transportation ("State"), files this offer of financial assistance ("OFA") to acquire the rail lines that Montreal, Maine & Atlantic Railway, Ltd. ("MMA" or "Applicant") seeks to abandon in this proceeding. This OFA is submitted in accordance with the regulations set forth in 49 CFR 1152.27, *et seq.*, and the schedule established by the Board in its decision served [June 22, 2010], and is conditional on the Board finding that abandonment of the rail lines should be authorized.¹ An OFA to acquire a line for continued rail service need not be detailed, but an offeror must show that it is financially responsible and that the offer is reasonable. *See Arizona & California Railroad Company – Abandonment Exemption – In San Bernardino and Riverside Counties, CA*, STB Docket No. AB-1022 (Sub-No. 1X) (served July 29, 2009); *East Penn Railroad, LLC – Abandonment Exemption – In Berks and Montgomery Counties, PA*, STB Docket No. AB-1020X (served December 2, 2008). *See also Conrail Abandonments under NERSA*, 365 ICC 472 (1981). State of Maine. The State and this OFA clearly satisfy both requirements.

¹ This OFA is submitted without prejudice to the State's position as set forth in its Protest (and the protests of other parties) that abandonment authority should be denied.

Background

On February 24, 2010, Montreal, Maine & Atlantic Railway, Ltd. ("MMA") filed an application (the "Application") to discontinue rail service on and abandon five subdivisions totaling approximately 233 miles (the "Abandonment Lines") described in the Application as follows:

- (1) the Madawaska Subdivision, consisting of approximately 151 miles of line between milepost 109 near Millinocket and milepost 260 near Madawaska in Penobscot and Aroostook Counties;
- (2) the Presque Isle Subdivision, consisting of approximately 25.3 miles of line between milepost 0.0 near Squa Pan and milepost 25.3 near Presque Isle in Aroostook County;
- (3) the Fort Fairfield Subdivision, consisting of approximately 10 miles of line between milepost 0.0 near Presque Isle and milepost 10.0 near Easton in Aroostook County;
- (4) the Limestone Subdivision, consisting of approximately 29.85 miles of line between milepost 0.0 near Presque Isle and milepost 29.85 near Limestone in Aroostook County; and
- (5) the Houlton Subdivision, consisting of approximately 16.9 miles of line between milepost 0.0 near Oakfield and milepost 16.9 near Houlton in Aroostook County.

The State, shippers and other interested parties have opposed the abandonment. This OFA is being filed to protect the right of the State to pursue a purchase of the Abandonment Lines in the event the Board grants MMA the abandonment authority it has requested.

The State's goal has long been to preserve rail service in the Aroostook County region served by the Abandonment Lines and throughout the State, by acquiring the Abandonment Lines and entering into an agreement with an operator who will fulfill the common carrier obligations. As such, and as noted in prior pleadings and at the public hearing by both MMA and the State, the State is negotiating with MMA regarding the purchase of the Abandonment

Lines. To date the parties have not been able to reach a negotiated agreement with terms and conditions which the State believes are necessary to make continued operations economically feasible, and which are acceptable to both parties. The State is willing to continue negotiations both before and after the Board rules on MMA's Application, and whether or not the abandonment authority is granted.²

OFFER OF FINANCIAL ASSISTANCE

The State hereby offers to purchase all of the Abandonment Lines for the following purchase price and on the following terms and conditions³:

PURCHASE PRICE:

| | |
|--------------------------------|---------------------|
| Land | \$ 1,690,000 |
| Rail and other track materials | \$16,419,129 |
| TOTAL: | \$18,109,129 |

Other terms and conditions:

- (1) Closing within 120 days.

If the OFA proceeds, the State intends to acquire the Abandonment Lines as lines "approved for abandonment" and to contract with an operator to provide service. As such the State will not have any common carrier obligation; only the operator will incur a common

² The negotiations which are taking place are confidential. The purchase price and the other terms and conditions requested in this OFA do not necessarily reflect the current status of the negotiations. The State does not intend this OFA to represent a change in its position on terms that have been agreed to in negotiations, but rather to represent terms requested if negotiations are ultimately unsuccessful.

³ MMA and the State have agreed that information submitted in this proceeding by the parties related to the calculation of net liquidation value no longer needs to be considered confidential. This includes information relating to steel prices and weights and amounts of steel, but does not include information that was submitted solely in the confidential mediation. Information regarding possible corridor use and related valuation remains highly confidential. Accordingly, references herein to specific information do not violate the protective order issued in this proceeding.

carrier obligation. *See* 49 CFR Part 1150, Subpart C. As soon as terms and conditions are either agreed upon by the parties or established by the Board and accepted by the State, the State will issue a request for qualifications and a request for proposals in order to select a rail operator. The State requests 120 days as a reasonable period of time to select the operator and negotiate an agreement, as well as for MMA to obtain necessary releases of liens (*see* condition 4 below).

- (2) Set off of \$4,956,122 against the Purchase Price at closing.

The State is entitled to a repayment in the amount of \$4,956,122 under a series of Rail Funding Agreements between the parties, as a result of MMA filing for abandonment. *See* State Protest. Moulton V.S., HC ME 158 and Exhibit C, HC ME 209.

- (3) Trackage rights over MMA to connecting carriers.

As designed by MMA, the Abandonment Lines are isolated from all other carriers in the region, and connect only with MMA. For operations of the Abandonment Lines to be economically feasible, the State believes that the operator must be able to provide direct connections to carriers other than MMA. The State proposes that MMA be required to grant its operator overhead trackage rights (1) between Madawaska, MP 260 and an interchange with Canadian National at St. Leonard; (2) between Millinocket, MP 109 and an interchange with Eastern Maine Railway/New Brunswick Southern Railways at Brownville Junction; and (3) between Millinocket, MP 109 and an interchange with Pan Am Railways at Northern Maine Junction. The State or its operator would be responsible for the costs of any additional infrastructure determined to be reasonably required at the interchange locations to accommodate the addition of trackage rights operations. The trackage rights would be at a reasonable commercial rate to be agreed to by the parties or as established by the Board in setting the terms and conditions of the OFA purchase.

- (4) The transfer to be free and clear of monetary liens and encumbrances, including those held by the FRA.

FRA has a first lien on all of the assets that comprise the Abandonment Lines, including a mortgage on the real estate. The State is not aware of any agreement between MMA and FRA to release its liens.

The State reserves its right to withdraw its OFA if any or all of the requested conditions are not imposed by the Board, or to proceed with the purchase even if all additional terms and conditions are not imposed.

In accordance with the requirements of 49 CFR 1152.27(c)(1)(ii), the State also provides the following information with respect to its OFA:

(A) Identity of Lines in Question

The State's OFA is for the acquisition of all of the Abandonment Lines as described above, and in the Application.

(B) Financial Responsibility of Offeror

As set forth in 49 CFR 1152.27(c)(1)(ii)(B), governmental entities such as the State are presumed to be financially responsible. Further, the State, based on the approval of a bond package by the voters of the State in June which included \$7,000,000 that could be used for the purchase of the Abandonment Lines, together with other funds that are available, will have sufficient funds available at closing. The State, in selecting an operator will ensure that the term of the lease will be for at least two years and that the operator will have sufficient funds to operate during such period.

(C) *Explanation of Disparity between Offer and Applicant's Estimate*

Applicant's estimate of the minimum purchase price as set forth in its Rebuttal filed with the Board on May 25, 2010, was as follows:

| ESTIMATE: | (Corridor) | (Across the fence) |
|---|---------------------|---------------------|
| Land ⁴ | \$ 4,180,000 | \$ 1,690,000 |
| Rail and other track materials ⁵ | \$22,099,876 | \$ 22,099,876 |
| TOTAL: ⁶ | \$26,279,876 | \$23,789,876 |

By comparison, as set forth above, the purchase price under the State's OFA is:

PURCHASE PRICE:

| | |
|--------------------------------|---------------------|
| Land | \$ 1,690,000 |
| Rail and other track materials | \$16,419,129 |
| TOTAL: | \$18,109,129 |

The basis for the difference between the State's offer and MMA's estimate is largely set forth in the Protest filed by the State on April 20, 2010 ("State Protest"), and is summarized herein.

Land value. MMA continues to argue that the Board should use a corridor valuation when valuing the land. MMA Rebuttal at 25-27. However, even with the additional information submitted with its Rebuttal, MMA has not provided evidence of any firm offers for use of the abandonment lines, or even substantially all of the rights-of-way, for use as a corridor. There have not even been any requests for trail use filed in this proceeding. Additionally, as

⁴ MMA Application. at MMA HC 12-16; Gottlieb V.S.; Sherwood V.S.

⁵ MMA Rebuttal, Sheahan Rebuttal V.S. at 3, Exhibit A.

⁶ The total was used by MMA in its Rebuttal to calculate opportunity costs (MMA Rebuttal, Finley Rebuttal V.S., Exhibit A), and the individual components were used in other calculations.

discussed more fully in the State Protest, a senior appraiser from the State's Department of Transportation Property Office noted that that (1) the corridor contains at least 66 miles of right-of-way for which MMA acknowledges it is without fee title, (2) in determining "highest and best use," public interest, and thus sales to the State of Maine for the public interest, should not be considered as they do not represent an economic use, (3) the comparable corridor sales were for much shorter distances than the 233 miles being abandoned here, and (4) the assumption that the corridor could be broken up and sold in pieces does not account for segments that might not sell. State Protest, Moulton V.S. at HC ME 169-160, Ex. E. All of these factors further mitigate against the use of a corridor valuation. Since MMA has provided no specific evidence of interest in the purchase of the Abandonment Lines as corridor, or any evidence that it would, upon abandonment, have a corridor to market, the extraordinary use of a corridor methodology is not appropriate.

For the purposes of this OFA, the State is willing to accept the "across the fence" valuation of \$1,690,000 presented by MMA. This valuation properly includes discounts for, among other items, property for which MMA does not have good title, sales and legal expenses, and for the time necessary to sell the property.

Rail and other track materials. In the State Protest, the State indicated it was willing to accept the steel prices and costs of removal/salvage as set forth in MMA's Application. MMA now argues in its Rebuttal that the Application (filed February 24, 2010) used November 2009 steel prices, and that by April, 2010 when the Rebuttal was filed steel prices had gone up. MMA Rebuttal at 23-24, Sheahan Rebuttal V.S. The State acknowledges that some steel prices did go

up between November 2009, and April, 2010⁷; however, since April those prices have been coming back down. Based on a recent review by the State's consultant Railroad Industries Incorporated (RII), current steel prices are as set forth in Exhibit A hereto.⁸ An alternative to using current prices would be to use an average which the Board will sometimes apply in periods of volatility. *See Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo, Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, STB Finance Docket No. 34335, slip op. at 14 (served October 28, 2004), *aff'd sub nom. Toledo, Peoria & Western Railway v STB*, 462 F.3d 736 (7th Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007). *See also Chicago & North Western Transportation Company – Abandonment between Marshalltown and Cedar Falls Junction and between Hicks and Dike – In Marshall, Tama, Grundy and Blackhawk Counties, IA*, ICC Docket No. Ab-1 (Sub-No. 211) . slip op. at 10 (served December 7, 1988) (accepting railroad use of six-month average of scrap prices over objection that estimate was at highest end of recent trading range). For the purposes of this OFA, the State has used current steel prices as determined by its consultant.

In the State Protest, the State pointed out various overstatements in the weights of rail and the numbers of ties based on its own inspection of the Abandonment Lines. *See State Protest, Hunter V.S.* at HC ME 234-237. MMA in its Rebuttal, reduced the number of ties (although not as much as the State's inspection), and acknowledged certain other errors in its rail counts. *See*

⁷ As shown in Ms. Sheahan's rebuttal, the price of relay steel has remained largely the same. MMA Rebuttal, Sheahan Rebuttal V.S., Exhibit B.

⁸ Scrap and reroll prices were based on the July 12, 2010 weekly Scrap Price Bulletin Update Report published by Metal Bulletin, Ltd, using the price for Philadelphia, less an estimated cost of transportation from Maine to Philadelphia. Relay rail prices were based on discussions this week with rail salvage companies doing business in the New England area – National Salvage and Iron Horse Preservation – and represent a blended rate based on the information obtained.

MMA Rebuttal, Sheahan Rebuttal V.S. at 3-5. The State continues to rely on its inspection report in determining the value of the rail and other track materials. Based on the current steel prices, the State's identification of weights and amounts of rail and ties, and MMA's salvage costs, the State calculates the net liquidation value of the rail and other track materials to be \$18,254,979. A total for each subdivision is shown on Exhibit B.

Thomas Crowley, a witness for Irving Woodlands, LLC, *et al* ("Irving"), pointed out that MMA incorrectly characterized some rail materials as continuously welded rail (CWR) rather than jointed. Irving Protest, Crowley V.S at 12. Mr. Crowley calculated that this caused the net liquidation value to be overstated by \$116,128. The State has deducted that amount from its calculation of the net liquidation value of the rail and other track materials to reduce the total value to \$18,138,851.

An additional significant reason for the difference in price between the State and MMA is the failure of MMA in its latest calculations to discount the value of the rail and other track materials for the time that it will take to salvage these 233 miles of rail lines. Ms. Sheahan who calculated the NLV for track and materials acknowledged in her initial statement that salvage would take 2-3 years. and that the net liquidation value should be discounted to present value at the rate of 5% per year. MMA Application, Sheahan V.S., HC MMA 192, Exhibit E, HC MMA 210. The State agrees that it is the discounted present value that represents the true salvage value of track and materials to MMA today. Mr. Finley seemed to agree in his rebuttal that the a discounted value should be used; he stated that Ms. Sheahan had discounted the net liquidation value, and that he was using the discounted value in his calculations. MMA Rebuttal, Finley Rebuttal V.S. at 4. In fact, however, reviewing Ms. Sheahan's Rebuttal Verified Statement and her calculations it is clear that in her new calculations she did not discount the net salvage value

to present value.⁹ When the State applies the same discount rate to the net liquidation value it calculated, it reduces the value from \$18,138,851 to \$17,147,129.

Finally, as pointed out in the State Protest, MMA did not include any costs for the restoration of the 91 at-grade crossings of the Abandonment Lines.¹⁰ State Protest, Moulton V.S. at HC ME 158-159. MMA acknowledges that it did not include such costs originally, but now claims that the value of the signal boxes at the 51 signalized crossings will partially offset the costs of restoration of the crossings. MMA Rebuttal, Sheahan Rebuttal V.S. at 5-6. Although MMA acknowledges that there still will be an additional cost of restoration of \$322,000, it does not include such costs in its net liquidation value calculations. See Sheahan Rebuttal V.S., Exhibit A. Neither the value of the signal boxes, nor the costs of removal of the signals were included in either MMA's original or its rebuttal calculation of net liquidation value, presumably on the bases that the value of the signal boxes would only cover the costs of removal of the signals themselves. (In its new calculation, MMA does not include any value for removal of the signals.) Since MMA has not produced convincing evidence that the signal boxes have value over and above their cost of removal, the State has further reduced its calculation of net liquidation value by \$728,000 (91 crossings at \$8,000 per crossing). This reduces the net liquidation value of rail and other track materials to a final total of \$16,419,129.

Summary. In sum, the purchase price submitted by the State as its OFA is comprised of \$1,690,000 based on the across-the-fence valuation of the land, and \$16,419,129 based on its calculation of the net liquidation value of the rail and other track materials, for a total of

⁹ If she had, the net liquidation value of the rail and track materials would have been reduced from \$22,099,876 to \$20,891,591.

¹⁰ The State originally contended there were 98 crossings. However, for the purpose of this OFA, it accepts MMA's reduced count.

\$18,109,129. The State reserves the right to request a different price and terms and conditions if the parties are unable to reach an agreement and the Board is requested to set terms and conditions.

REQUEST FOR TOLLING OF OFA PROCESS

Procedurally, this proceeding is not running in accordance with the usual schedule. In abandonment proceedings, OFA's would generally not be due until 10 days after the Board determines to grant the abandonment, and the parties would then have 30 days to negotiate or request Board to set terms and conditions. 49 CFR 1152.27(c)(1)(i)(B); 1152.27(g). When a request is made for the Board to set terms and conditions, the requesting party must simultaneously present its full case on the merits. 49 CFR 1152.27(h)(3). Since an OFA cannot be effective until and unless the Board approves the abandonment, the State requests that the Board review and accept its OFA, but that the balance of the OFA process be tolled until the Board issues its decision on whether abandonment should be granted. (The Board in its decision served June 22, 2010, acknowledges that it may consider tolling the process.) If the Board grants the abandonment, then the State requests that it be given the full 40 days from the date of the Board's decision to try and finalize an agreement with MMA before requests for the Board to set terms and conditions are required to be filed.

CONCLUSION

Based on the foregoing, the State hereby requests that the Board determine that it is financially responsible and that this offer of financial assistance to purchase of the Abandonment Lines is reasonable. Further, the State requests that the Board toll the offer of financial assistance procedures until after the Board issues its decision on the merits of the abandonment application.

Respectfully submitted,

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Dated: July 16, 2010

Attorneys for State of Maine, Department of
Transportation

VERIFICATION

I, Robert Elder, Director, Office of Freight and Business Services, Bureau of Transportation Systems Planning of the Maine Department of Transportation, verify under penalty of perjury that statements contained in the foregoing Verified Statement are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on July 16, 2010.



Robert Elder

EXHIBIT A

Railroad Industries Incorporated

Steel Prices Unit Values

| Unit Value Applied on July 16 Update | | |
|--------------------------------------|-----------------|-----|
| Track | | |
| | Scrap value | 222 |
| | Reroll value | 327 |
| | 100lb relay | 450 |
| | 112lb relay | 600 |
| | 115lb Jnt relay | 665 |
| | 115lb CWR relay | 665 |
| OTM | | |
| | OTM scrap | 222 |
| | 100lb OTM relay | 450 |
| | 112lb OTM relay | 600 |
| | 115lb OTM relay | 665 |
| Turnout | | |
| | Turnout scrap | 222 |
| | 100lb relay | 450 |
| | 112lb relay | 600 |
| | 115lb relay | 665 |

EXHIBIT B

| 7-16-10 NLV Update based on RII Track Inspection Report | | |
|---|-----------|-------------------|
| Madawaska Subdivision | \$ | 14,580,134 |
| Houlton Subdivision | \$ | 912,204 |
| Presque Isle Subdivision | \$ | 1,786,843 |
| Fort Fairfield Subdivision | \$ | 274,411 |
| Limestone Subdivision | \$ | 701,387 |
| Total NLV of Track & Ties | \$ | 18,254,979 |

CERTIFICATE OF SERVICE

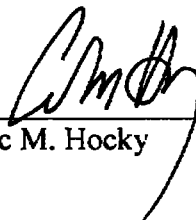
I hereby certify that on the date set forth below, I caused a copy of the foregoing Offer of Financial Assistance (OFA) to Acquire Rail Lines, and Request for Tolling of OFA Process, to be served electronically on counsel for Montreal, Maine and Atlantic Ry., Ltd., as follows:

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and to be served on all other parties of record either electronically or by U.S. first class mail, postage prepaid.

Dated: July 16, 2010



Eric M. Hocky